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No. 225.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

WILLIAM MARCUS, TITLE NEWS COMPANY, HOMER SMAY, KANSAS CITY NEWS DISTRIBUTORS, JACK GORDON, HARVEY HAMMER, TOWN BOOK STORE, RUBACK'S NEWS STAND, JACK K. RAYBURN, and TED'S NEWS SHOP,

Appellants,

v.

SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 1 EAST THIRTY-NINTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 123 EAST TWELFTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 5 WEST TWELFTH STREET, KANSAS CITY, MISSOURI, and SEARCH WARRANT OF PROPERTY AT 221 EAST TWELFTH STREET, KANSAS CITY, MISSOURI,

Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

BRIEF FOR THE APPELLANTS.

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OPINIONS BELOW.

The opinions of the Supreme Court of Missouri en banc (R. 115-128), are reported at 334 S. W. 2d 119. The opinion of the Supreme Court of Missouri, Division Number

Two (R. 103-114) is identical to the main opinion of the Court en banc. The opinion of the Circuit Court of Jackson County, Missouri (R. 81-91), is not reported.

JURISDICTION.

The judgment of the Supreme Court of Missouri En Banc, was entered on March 14, 1960 (R. 130). A timely petition for rehearing was denied on April 11, 1960 (R. 128). Appellants filed their notice of appeal to this Court on May 27, 1960 (R. 131-134). The jurisdiction of this Court to review this decision by direct appeal was invoked under 28 U. S. C., § 1257 (2). On July 11, 1960, the jurisdictional statement was filed. On October 10, 1960, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 135).

STATUTES INVOLVED.

Sections 542.380, 542.390, 542.400, 542.410, and 542.420, R. S. Mo. 1949, Rule 33 of the Rules of the Supreme Court of Missouri and Amendments 1 and 14 of the United States Constitution are set forth in Appendix A, infra, p. 35.

QUESTIONS PRESENTED.

The violation of appellants' rights of freedom of speech and the press under Amendment One of the United States Constitution as made applicable to the states by Amendment Fourteen of the United States Constitution is in each of the following questions presented.

(1) Whether proceedings under Missouri statutes, §§ 542.380-542.420, R. S. Mo. 1949, and Rule 33 of the Missouri Supreme Court Rules preventing dissemination and distribution of publications alleged to be obscene (but not

yet found to be offensive by any Court), (a) by providing for their ex parte seizure before a trial or hearing is held for determining if their character warrants condemnation and (b) by permitting the general seizure by police officers and deputy sheriffs from retail and wholesale magazine and news vendors of property specified merely as of an obscene character, authorize an unconstitutional censorship and previous restraint of publications.

(2) Whether the determination of the issue of obscenity by a trial judge applying unconstitutional tests and standards of obscenity and a review by an appellate court refusing to set aside the trial judge's judgment on the issue of obscenity because it was not "clearly erroneous" impaired appellants' right of freedom of speech and press.[1]

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[1] A third question in this case is as follows: (3) Whether the publications seized are obscene under the standard set forth in *Roth v. United States*, and *Alberts v. California*, 354 U. S. 476, and whether the finding that the publications are obscene violated appellants' freedom of speech and press. Although appellants believe these publications are not obscene, this question is not being pressed because of the practical difficulties involved in examining 100 separate publications.

STATEMENT.

Sections 542.380-542.420, R. S. Mo. 1949, provide for the seizure of publications alleged to be obscene and authorize their destruction if they are found to be obscene. Section 542.380 provides that upon a verified complaint a search warrant may be issued to a sheriff directing him to search and seize obscene books and publications which are kept for the purpose of distribution or circulation. Section 542.400, R. S. Mo. 1949, requires a hearing within five to twenty days after the search and seizure for determining the character of the property seized and commands that the officer in charge of the seized property "retain possession of the same until after such hearing." Subsequent to the seizure of the publications, the statute also requires notice of the seizure and a hearing opportunity to claimants. If the publications are found to be obscene by the judge issuing the warrant at the hearing, the statute authorizes their destruction. Rule 33 of the Rules of the Missouri Supreme Court deals with the procedural aspects of searches and seizures of personal property when authorized by statute.[2]

Acting under the above statutes, on October 10, 1957, search warrants were obtained from the Circuit Court of Jackson County, Missouri, by an officer of the Police Department of Kansas City. One warrant was directed against the premises of a business wholesaling newspapers, books and magazines (R. 2-3), the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail (R. 1-2, 37-38). The warrants were issued after complaints were filed by the police officer alleging that on October 8, 1957, at the premises of the respective appellants certain persons kept

[2] This rule was drafted and promulgated pursuant to authority granted the court by Section 5 of Article V of the Constitution of 1945 of the State of Missouri which allows that Court to establish rules of practice and procedure for all Courts provided they do not change substantive rights.

property described as "obscene books, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, immoral and scandalous character" for the purpose of selling, publishing, exhibiting or otherwise distributing (R. 2-3). No publication was either specifically mentioned in the complaint nor displayed to the Court before the warrants were issued (R. 39-40). Upon these complaints the Circuit Court issued its search warrants authorizing the search of appellants' premises and the seizure of "said above-described property or any part thereof" and ordering that the property so seized be returned to the Court to be dealt with in accordance with law (R. 3-4).

The search warrants were executed on the issuing day and returns were filed in Court together with inventories of more than 11,000 publications seized.[3] A copy of the inventory was left with the person from whose possession the property was seized. Notices were served upon the interested parties of a hearing to be held in the Circuit Court to determine whether the publications seized constituted obscene, lewd, licentious, indecent, or lascivious material within the meaning of Section 542.380, R. S. Mo. 1949, and as such subject to destruction (R. 5-19). Thereafter, appellants filed separate motions for the immediate return of the property seized and to quash the search warrants (R. 32, 17-23, 1-2).[4] These motions alleged, inter alia, that Section 542.380 and Section 542.400, R. S. Mo. 1949, and Rule 33 of the Missouri Supreme Court Rules, were unconstitutional for the reason that they permitted a search and seizure of publications ex parte without notice or hearing "prior to seizure" and thus constituted "a

[3] The total of the publications set forth in the inventories (R. 6-17).

[4] Appellants, prior to the hearing, filed original and supplemental motions to quash the search warrants and for the immediate return of the seized property (R. 32). Subsequent to the hearing amended motions to quash the search warrants and for the immediate return of the seized property were filed (R. 17-23 1-2).

prior restraint or censorship of said publication," impairing appellants' freedom of speech and publication in violation of Amendments 1 and 14 of the United States Constitution (R. 18-19). Similar constitutional objections were made to the application of the statute and rule to the instant cases and to the issuance of the search warrants (R. 19-21). The motions also alleged that the warrants were illegally issued because the complaints and the warrants did not describe the personal property to be searched for and seized in sufficient detail to enable the person serving the warrant to readily identify the same and that they did not describe the things to be seized as nearly as may be (R. 19-20). The motion concluded with the contention that each ground heretofore enumerated constituted a violation of the due process clause of Amendment 14.

At a hearing held pursuant to the notice given, a Kansas City police officer assigned to its Vice Squad testified he had made an investigation of the five retail news stands involved and purchased five openly displayed magazines. He also determined that the wholesale house was the distributor of all but one of the magazines of a list being investigated (R. 36-38). He later signed the complaints for the search warrants which made no specific mention of any publication (R. 36-37, 2-3). No magazine or other evidence was presented to the Court prior to the issuance of the warrants (R. 39-40, 42). The parties from whom the property was seized were not notified that a complaint would be filed, and were not given an opportunity to be heard prior to the seizure (R. 41-42).

At each of the five retail newsstands, a police officer supervised the search and seizure of the property involved, made a personal selection and determination of which publications to seize and confiscated all publications which he decided were subject to seizure (R. 44, 47-48). At the wholesale distributor, the officers who searched had a list of magazines to be seized prepared by the Police Depart-

ment and further seized anything else which in their judgment merited seizure (R. 50-52). The wholesaler had on hand hundreds of thousands of copies of periodicals (R. 52). Most of the items seized were held for purposes of circulation (R. 53-56).

By its judgment on December 12, 1957, the trial court overruled the motions to quash and for the return of the property and found that 100 of the 280 different publications were in violation of the obscenity statute, Section 542.380 (2) (R. 81-93). The trial court relied on the Missouri decisions of **State v. Pfenninger**, 76 Mo. App. 313; **State v. Mac Sales Co.**, Mo. App. 263 S. W. 2d 860 and **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283 and applied the test of "whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such a publication may fall" (R. 83-84). The court concluded that "in the light of the test laid down by the courts of this State, I am of the opinion that the Exhibits described in Schedule 'A' * * *. are obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character, within the meaning and intent of the Missouri Revised Statutes, 1949, Section 542.380" (R. 84-85, 92). The trial judge held that these publications should be retained by the sheriff as necessary evidence for the purpose of possible criminal prosecution and then should be destroyed (R. 85, 92-93). No criminal prosecution was ever instituted. The remaining 180 publications and all copies thereof were ordered to be returned.

The publications found to be obscene were both dated and undated and included the following[5]: Magazines de-

[5] These publications are not obscene under the standard set forth in Roth v. United States and Alberts v. California, 354 U. S. 476. See Sunshine Book Co. v. Summerfield, 355 U. S. 372, reversing D. C. Cir., 249 F. 2d 114 and 128 F. Supp. 564; One, Inc., v. Olesen, 355 U. S. 371, reversing 9 Cir., 241 F. 2d 772; Times Film Corporation v. Chicago, 355 U. S. 35, reversing 7 Cir., 244 F. 2d 432. See also Comm. v. Moniz, 338 Mass. 442, 155 N. E. 2d 762.

signed to promote the cause of nudism (Exhibits 39, 60, 64, 102, 244); photography magazines containing articles and texts designed to assist photographers in taking photographs including some pictures of women with breasts or buttocks exposed (Exhibits 21, 29, 37, 47, 51, 52, 63, 77, 78, 94, 95, 195, 209, 210, 215, 217, 226, 227, 233, 241, 247, 255); other photography magazines containing fewer articles and texts (Exhibits 25, 65, 200); magazines containing texts and articles on a variety of subjects which contained some photographs of women with breasts or buttocks exposed (Exhibits 3, 4, 23, 26, 28, 30, 55, 57, 59, 61, 74, 121, 234); magazines containing pictures of women primarily, some of whom are scantily attired but with no picture displaying women with breasts, buttocks or genitalia exposed (Exhibits 38, 66); magazines containing texts and articles of a non-fictional character, illustrated by photographs, some of which were of women but no pictures displaying bare breasts, buttocks or genitalia (Exhibit 67); magazines containing articles on a variety of subjects designed for circulation among Negroes (Exhibit 7); magazines containing texts including articles by Giovanni Boccaccio and Guy de Maupassant (Exhibits 22, 45); books containing cartoons and jokes similar to those found in nationally known and circulated magazines (Exhibits 257, 271); books containing information and advice regarding the physical, psychological and emotional aspects of marriage (Exhibit 264); modeling magazines (none found at the wholesale distributor) which contained photographs of women, some clothed and some of whom have breasts or buttocks exposed (Exhibits 100, 124, 127, 134, 144, 187, 188, 192, 193, 196, 199, 200, 201, 202, 205, 211, 237, 239, 240); certain publications entitled "Exotique", found only at two retail distributors (221 East 12th and 104 East 10th), some with photographs of persons attired in high heels, boots, gloves, corsets and stockings (Exhibits 197, 214), and others with texts in addition to such photographs (Exhibits 189, 198, 230).

Appellants filed a timely motion for a new trial which realleged the constitutional violations set forth in their pretrial motions (R. 93-99). Objection was further made that the standard applied by the trial Court in its determination of the obscene was "unconstitutional under **Roth v. United States** and **Alberts v. California**, 354 U. S. 476, **Butler v. Michigan**, 352 U. S. 380," impairing appellants' "right of freedom of speech and press" in violation of "the free speech clause of Amendment I of the United States Constitution and the due process and privilege and immunities clause of Amendment 14 of the United States Constitution" (R. 94). This motion was not passed on by the Court within the 90 days after its filing and was thereby deemed automatically denied by Missouri statute on March 23, 1958. Appellants then filed timely notices of appeal to the Supreme Court of Missouri (R. 100-102). On July 13, 1959, Division 2 of the Supreme Court of Missouri entered a decision affirming the judgment of the trial Court (R. 104-114). A timely motion to transfer the case to the Court en banc was filed and on September 14, 1959, the cases were transferred to the Supreme Court of Missouri en banc (R. 115).

The Missouri Supreme Court noted that "constitutional questions have been timely and properly preserved." It summarized appellants' contention relative to the invalidity of the Missouri statute and rule as follows (R. 118-119):

> "The appellants charged that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15, of the Missouri Constitution protecting them against unreasonable searches and sei-

> zures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, and that there is a distinction between a restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most 'exceptional cases', citing Near v. Minnesota ex rel. Olson, 283 U. S. 697-716, 51 S. Ct. 625-631, 75 L. Ed. 1357."

In regard to appellant's contention that the trial Court applied the wrong standards by following **State v. Mac Sales Co.**, Mo. App., 263 S. W. 2d 860, 863; **State v. Pfenninger**, 76 Mo. App. 313, 317, and **State v. Becker**, 336 Mo. 1079, 272 S. W. 2d 283, 287, the Court stated (R. 121):

> "* * * The appellants assert that the trial court applied the test and standards of obscenity stated in those cases and that such tests and standards are violative of their rights of freedom of speech and press under the federal and state constitutions by virtue of the standards adopted by the Supreme Court of the United States in Roth v. United States and Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 1398 and Butler v. Michigan, 352 U. S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. * * *"

The Missouri Supreme Court affirmed both while sitting in division and en banc (R. 104-114; 116-127), holding that the constitutional questions presented had been resolved

adversely to appellants' contention by **Kingsley Books, Inc. v. Brown**, 354 U. S. 436 and concluding (R. 121):

> "The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; Missouri statute provides that the hearing shall be not less than five nor more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no complaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied."

The court below held, in regard to the standard applied, that the trial judge's opinion stated and the judgment held that the publications "were obscene, lewd, licentious, lasciyious, indecent and of an immoral and scandalous character 'within the meaning and intent of Missouri Revised Statutes, 1949, Section 542.380' ", that the **Becker** case did not adopt a standard based upon the effect of the publication upon particularly susceptible persons, that the listing of **Becker** in a footnote in the **Roth** and **Alberts** case indicated its standard was constitutional, that appellate review is upon the law and evidence, that a trial court's opinion "is not binding and preclusive even if deemed a statement of grounds of decision", that the judgment should not be set aside unless "clearly erroneous" and that it was not "clearly erroneous" (R. 122, 127).

SUMMARY OF ARGUMENT.

By statute and court rule, Missouri permits a search warrant to be issued for the seizure of all obscene publications at a particular location. Subsequent to the seizure, provisions provide that the judge issuing the warrant, after notice to known claimants, determine if the property is subject to seizure and, if so, to destruction. Acting under such provisions and upon a complaint that "obscene" publications were being kept for circulation by five retail and one wholesale distributor, a trial judge issued warrants directing that all "obscene" publications be seized from their premises. After police and deputy sheriffs seized wholesale quantities of publications from those places, the Court held a hearing and concluded that part of the items seized were subject to seizure and ordered that such items be destroyed.

I.

This court has jurisdiction to review this appeal. The validity of the statutes and rule on grounds of repugnancy to the United States Constitution was presented in both courts below and rejected. The question of the validity of the initial ex parte mass seizure is still alive even though the publications at issue, have been condemned as obscene after a hearing. The entire Missouri statutory scheme has to be considered as a whole and, since it limits freedom of expression, should be condemned in its entirety.

The question relating to the obscenity standard applied by the trial court is cognizable either separately by certiorari or as part of an appeal which is otherwise within this court's jurisdiction. The trial courts decided the obscenity question in reliance on **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283, a case which established an uncon-

stitutional test for determining obscenity. The conclusion of the appellate court that the **Becker** case applied a constitutional standard is without a reasonable basis and it does not constitute an adequate non-federal ground of decision.

II.

In **Kingsley Books, Inc. v. Brown**, 354 U. S. 436, this court upheld a state statute which permitted a limited injunctive remedy under closely defined procedural safeguards against the sale and distribution of a specific publication found after due trial to be obscene. The statute withheld restraint upon matters not already published and not yet found to be obscene.

The Missouri statute is vastly different. It permits the seizure of publications prior to any determination that they are in fact obscene. A restraint from circulating is placed before any hearing. Moreover, Missouri does not confine the seizure to a particularly described publication. It authorizes the seizure of all publications at a certain address which the executing police officers find to be "obscene".

The result of the statute is a prior restraint upon publication and circulation. It will restrict the circulation of all writing and cause a self-censorship. Rather than subject his premises to mass seizures, a distributor will tend to restrict his stock to writings which meet the approval of petty police officials.

The major purpose of the constitutional guarantee of free expression was to prevent prior restraint. This court has struck down numerous systems of censorship and licensing. Prior restraints hinder the flow of ideas as well as the development of sound standards of obscenity. At the very least, a publication which has not been ad-

judged obscene cannot constitutionally be banned from circulation.

A trial judge who orders a mass seizure of publications is unsuited for determining the issue of their obscenity because he operates under a compulsion to find some publications obscene. Nor may a state affirmatiyely sanction such police interference with free expression. Such basis rights should be enforced by not allowing a state to condemn any publication under such a method.

There is no overriding public interest which justifies this procedure. Obscenity may be controlled by a penal statute or by a narrow injunctive procedure, essentially penal in nature. It may not be regulated like gambling or intoxicating liquor which are not protected by the First Amendment. The dangers to free expression outweigh the evil the Missouri procedure is supposed to control.

III.

The courts below applied unconstitutional tests of obscenity. The trial court's opinion relied upon **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283 in determining the question of obscenity. That case adopted a test which judged the effect of the publication "in the suspectible". The conclusion of the Missouri Supreme Court that the **Becker** case rejected such a standard is not reasonable. Moreover, the appellate court reviewed the case by the clearly erroneous test. This itself is of doubtful constitutional validity where rights of freedom of expression have been determined by a single individual. But, in all the circumstances of this case, these publications have been condemned in violation of the constitution.

ARGUMENT.

I.

This Court has jurisdiction to review this appeal.

Final judgments rendered by the highest state court may be reviewed by this Court if they uphold the validity of a state statute questioned on the ground of repugnancy to the United States Constitution. 28 U. S. C. 1257 (2).

As the Court below recognized (R. 117-119, 127-128, 18-21, 94-95), and as the statement details, the validity of the Missouri statutes and court rule on the ground of repugnancy to the free speech provisions of the United States Constitution were duly raised and presented below. While the main thrust of appellants' contention is on the statutes, the court rule is a "statute" within the meaning of 28 U. S. C. 1257 (2), because it is an enactment which is given the force of law. **Reinman v. Little Rock, Ark.**, 237 U. S. 171, 176.

The claim of unconstitutionality of the statute rests in the first instance on the ex parte mass seizure by police of the publications prior to any determination of the obscenity issue. The question thus presented is whether this issue is still alive after the publications have been condemned by a hearing. We believe this issue is tied to the question of the constitutionality of the Missouri statutes on the merits. This for the reason that, as argued below, the procedure employed for condemnation is unconstitutional and a nullity. The entire Missouri scheme has to be considered as a whole and, since it limits freedom of expression should be invalidated in its entirety. To hold otherwise would allow a State to ban a book by the censorship method. This Court has noted jurisdiction on appeals involving an administrative agency's refusal to issue a license to

a motion picture film distributor for general exhibition of a certain film. Such a license issues unless the film is found to be obscene. E. g., **Kingsley International Pictures Corp. v. Regents of N. Y. U.**, 360 U. S. 684. The system used by Missouri is akin to licensing. Instead of generally requiring a distributor to obtain a license for each publication, Missouri compels a "license" only if a police officer filed a complaint alleging that obscene publications are kept at a particular place. The police officer decides what publications are subject to "license." These he seizes and brings before the Court. The "license" is a court's determination that the publication is not obscene after deciding "whether the property is the kind of property mentioned in section 542.380." Moreover, as argued in point 2, this seizure by search warrant should be struck down, because it has the consequence of unduly curtailing the liberty of freedom of speech and press.[6]

The entire statutory scheme provided by Missouri rests on the seizure. Section 542.380 authorizes the seizure. Section 542.390 lists the contents required by search warrant and the power of the executing officer. Sections 542.400 and 542.410 provide for notice and a hearing to determine whether the property was subject to seizure. Section 542.420 permits the destruction of the property if it was properly seized. Accordingly, the condemnation rests upon the seizure.

Appellants also claim the property was not constitutionally subject to be condemned as obscene and that an unconstitutional standard was used to ban the publication. Thus the second question presented involves the denial of a federal right which is properly before the Court if there is another question cognizable by appeal. Otherwise, it is

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[6] See Grosjean v. American Press Co., 297 U. S. 233; Murdock v. Pennsylvania, 319 U. S. 105.

only subject to review if this Court grants certiorari. This question relates to the standard applied by the trial court in determining the issue of obscurity. This test was questioned below on constitutional grounds (R. 94, 121). The court below attempted to rest this decision on a non-federal ground. But its holding does not rest on an adequate non-federal ground because its position is "without any fair or substantial support." **Staub v. City of Baxley,** 355 U. S. 313, 320. In determining the question of obscenity, the trial court relied on Missouri decisions, such as **State v. Becker,** 364 Mo. 1079, 272 S. W. 2d 283 (Appendix B, infra, pp. 41), which adopted an unconstitutional test of obscenity based on the tendency of the publication to arouse lewd thoughts in the susceptible (R. 83-84). See **Roth v. United States and Alberts v. California,** 354 U. S. 476, 488-489; **Butler v. Michigan,** 352 U. S. 380, 382-383. On appeal the Appellate Court found that its decision in **State v. Becker** had been approved by this Court as applying the correct test because it was listed in a footnote as one of the decisions which rejected the standard applied by **Regina v. Hicklin** (1868), L. R. 3 Q. B. 360.

Undoubtedly the State Court had the power to construe the **Becker** case and to re-examine and overrule it and to declare what the law has been. But the reasonable interpretation of the **Becker** opinion is that it included the effect of the alleged obscene material upon the susceptible. It is also clear that the trial judge applied such a test. The State Court in deciding this case may not do so in such a manner that denies the federal right to have all the publications judged in accordance with the proper standards. See **Brinkerhoff-Faris Trust & Savings Co. v. Hill,** 281 U. S. 673.

The Appellate Court held, on the one hand, that it was not bound by the trial judge's opinion and, on the other hand, that his judgment was not "clearly erroneous" (R.

122, 127). As a result the constitutional standard adopted in **Roth v. United States** and **Alberts v. California**, 354 U. S. 476, 489, based on the effect of the publication upon the average person was not applied. The trial court's opinion was part of the record below. It explained the grounds upon which its judgment was based. It primarily followed the last opinion of the Missouri Supreme Court on the subject of obscenity, an opinion which applied an unconstitutional test. Even if it had not filed an opinion, the trial court would have been bound by the decision of the State Supreme Court under local practice. **Smith v. St. Louis Public Service Co.**, 364 Mo. 104, 259 S. W. 2d 692, 694. The procedure adopted by the Missouri Court should not be allowed to defeat a federal right under the name of local practice when this right was plainly and reasonably made. We accordingly believe that the decision on this point does not rest upon an adequate non-federal ground.

The judgment in this case that the condemned property be destroyed is a final one terminating the litigation (R. 91-93). The Missouri statutes provide for an independent proceeding and are not merely a step in a criminal prosecution. **State v. Mac Sales Co.**, Mo. App., 263 S. W. 2d 860, 862.[7]

This is a case where property has by direction of the Court been taken from appellants and turned over to the sheriff. The Court is able to undo that which has been done by compelling a return of the property illegally confiscated. The property seized still has value, although the monetary value of some of the publications, being dated, has

[7] Similar judgments have been considered to be final in cases arising in the federal courts where the emphasis has been on the return of property rather than its suppression in evidence. E. g. *Steele v. United States*, No. 1, 267 U. S. 498; *United States v. Kirschenblatt*, 2 Cir., 16 F. 2d 202; *Burdeau v. McDowell*, 256 F. 2d 465 cf. *Cargoll v. United States*, 354 U. S. 394, and *Perlman v. United States*, 247 U. S. 7.

probably been reduced by the passage of time. Indeed the desire of the State officials to still destroy the property is itself an indication of its value.

II.

The Missouri procedure imposes an unconstitutional prior restraint on freedom of communication by permitting a mass seizure of publications at the discretion of the police prior to any determination that the publications subject to seizure are in fact obscene.

In **Kingsley Books, Inc. v. Brown,** 354 U. S. 436, a New York obscenity statute authorized a municipality to bring an injunction suit to prevent the sale or distribution of an obscene publication or matter and further provided that the person sought to be enjoined was entitled to a trial of the issues within one day after joinder of the issues and a decision by the Court within two days after the conclusion of the trial. A complaint charged petitioners with displaying for sale a specific obscene booklet. It prayed that they be enjoined from further distribution of the booklet, that they be required to surrender to the sheriff for destruction all copies in their possession and that, upon failure so to do, the sheriff be commanded to seize and destroy the copies. On the same day petitioners were ordered to show cause within four days why they should not be enjoined pendente lite from distributing the books. Petitioners consented to an injunction pendente lite. After a trial, the booklet was found obscene, its further distribution enjoined and destruction of all copies ordered.

This Court upheld the New York procedure against the booksellers and their particularly named booklet. It noted that the statute permitted a "'limited injunctive remedy' under closely defined procedural safeguards,

against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure, in default of surrender, of the condemned publications" 354 U. S. at 437. The opinion compared the statute with a criminal obscenity statute and found similar restraints imposed with the same threat of subsequent penalization as an effective deterent against distribution. The Court was careful to point out that a New York book seller, even after the injunction procedure is instituted, may still sell the accused book, subject to punishment for contempt. But this the Court says is no different than being subject to penalties under criminal statutes. The Court concluded that the statute "studiously withholds restraint upon matters not already published and not yet found to be obscene." 354 U. S. at 445.

In Missouri, the statute as construed authorizes a police officer to file a complaint directed at a specific location distributing magazines, books and newspapers, alleging that it has kept for the purpose of selling, publishing, distributing or circulating "obscene, lewd, licentious, indecent and lascivious books, pamphlets, papers * * * pictures * * * and other articles or publications of an indecent, immoral and scandalous character" (R. 2-3). On the basis of such a complaint, a Court may issue a search warrant commanding a peace officer to search the specific premises and seize and take into his possession property described as "obscene, lewd, licentious, indecent and lascivious books, pamphlets, papers * * * pictures * * * and other articles or publications of an indecent, immoral and scandalous character" (R. 3-4). The statute, after seizure, requires a hearing to determine the character of the property and commands that the peace officer retain possession of the property until after the hearing. At the hearing it then becomes the duty of the judge issuing the warrant to decide whether the property seized was subject to seizure and as such liable to destruction. On appeal, his findings

are not subject to correction unless they are "clearly erroneous."[8]

We believe that the Missouri procedure and the New York procedure are vastly different in kind and that the distinction between them points out the basic unconstitutionality of the Missouri procedure. New York has a limited injunctive remedy under closely defined procedural safeguards. Missouri has a broad seizure provision permitting loosely defined action.

New York withholds restraint upon publications not yet found to be offensive and permits the seizure of printed matter, if found to be obscene, subsequent to trial only.[9] Until a publication is declared obscene by a Court, the distributor may keep his periodical and sell it at his own risk. He is not restrained from circulating before the determination that it is offensive if he chooses to risk

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[8] Under the New York statute the determination of obscenity by trial judge is subject to full appellate review on the law and the facts. N. Y. Civ. Prac. Act, § 584.

[9] In 1955 New York Legislative Bill No. 2801 would have amended the act to permit an injunction and seizure without notice, but it was vetoed by the governor. The new subsection it would have added read as follows:

> 1-a. Before or at the time of the commencement of the action for an injunction herein described any such officer may apply for an injunction order under section eight hundred seventy-seven of the civil practice act without notice to the person, firm or corporation sought to be enjoined; and such person firm or corporation may make an application to vacate or modify such injunction order under section eight hundred ninety-seven or section eight hundred ninety-eight of the civil practice act. Such order shall provide for the retention or seizure of any of the matter described in paragraph one hereof pending a determination of the issues by the court. Any peace officer may serve a copy of such order and, in connection with such service, is hereby empowered to search any premises where such matter is stored and make an inventory of the material covered by such order. When seizure is directed by such order, the peace officer shall leave an itemized receipt for the material seized. A copy of the inventory shall also be filed in the court without delay.

punishment.[10] **Kingsley** notes that the problem of interim activity pending the hearing on the obscenity issue was not before the Court. Professor Paul A. Freund in considering the problem of interim violations where a restraining order has been issued or a permit withheld has concluded: "If disobedience of the interim order is ipso facto contempt, with no opportunity to escape by showing the invalidity of the order on the merits, the restraint does indeed have a chilling effect beyond that of a criminal statute."[11] Missouri solves the interim problem by the seizure of publications prior to any determination that they are in fact obscene. The distributor is not given any choice as to whether he will continue to circulate the material or withdraw it. Rather the circulation is summarily curtailed by police officers without notice or an opportunity to be heard and prior to any judicial determination as to the character of the material. All the copies of a particular publication in any distributor's possession are seized by the police prior to any hearing. No opportunity to escape the ban pending the final determination is allowed except if the distributor is financially and otherwise able to secure additional copies. But these also may be summarily seized. Indeed he would be inviting a further mass seizure if he obtained any publication not approved by the police censor.

In New York, the action is confined against a particular publication named in a complaint. Missouri does not narrowly limit the seizure to a particularly described publication or even to a publication displayed to a Court prior to seizure. Rather it authorizes the executing police officer to seize all publications which he concludes fit the

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[10] Freedom of speech includes liberty of circulation. *Lovell v. Griffin*, 303 U. S. 444; *Winters v. New York*, 333 U. S. 507, 509; *Talley v. California*, 362 U. S. 60.

[11] Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539.

general description of obscene, lewd, licentious, indecent and lascivious or articles or publications of an indecent, immoral and scandalous character. The purpose of this procedure is to "protect the public from character contamination" by preventing the dissemination of obscenity (R. 120).

Even if a seizure of specific alleged obscene publications prior to a hearing is permissible under limited circumstances, the clean-sweep seizure authorized by this State would violate the constitutional guaranty of free speech and press. There is no question that some of the publications seized were not obscene. Indeed, the trial judge so found. But these were swept into the ambit of the warrants.[12] Missouri allows an examination of all thought and expression at a particular location if a police officer files an affidavit stating that the particular premises contains obscene matter providing a judge authorizes such action on the affidavit. The general description in the warrants are broader in scope than the executive warrant to search for evidence of the utterance of libel condemned in **Entick v. Carrington**, 19 Howell's State Trials, col. 1029. See **Frank v. Maryland**, 359 U. S. 360. Neither police nor any other executive censor should be allowed to seize all material from a magazine or bookseller which they determine falls within a general warrant allowing seizure of all obscene material. Especially is this so when the magazines or books have been openly displayed for sale and may be described by name, volume or issue.

The effect of the Missouri provisions is that a State, ex parte, prior to any hearing in order to determine the nature of the publications which a distributor possesses,

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[12] A statute limiting freedom of expression which does not aim specifically at evils within the allowable area of State control is invalid. *Thornhill v. Alabama*, 310 U. S. 88; *Winters v. New York*, 333 U. S. 507.

may obtain possession of all of his publications which a petty police official finds objectionable and retain these publications at least until after a hearing before the single judge who has authorized the seizure, determines the obscenity issue.[13] The distributor has no right to the publications unless this single judge finds that the material is not obscene or the appellate court upon review finds that the trial judge's conclusion were clearly erroneous. The result is a limitation upon circulation prior to dissemination to the public. When the publications are seized the material contained there must be examined in order to prevent publication and circulation of objectionable material. The items are censored by review and approval prior to distribution. A magazine or bookseller should have the right to circulate his material subject to subsequent restraint if the matter violates the obscenity laws. As long as the distributor is willing to risk the imposition of criminal law or contempt penalties he has a right to proceed with its distribution, and any restriction of that right is unwarranted since, among other things, it would deprive the public of the opportunity of reading and making its own appraisal of the challenged material.

The approval of such a procedure authorizing a mass seizure will only restrict the circulation of all writings. It will cause a self-imposed restriction of free expression. A book or magazine seller, knowing that his entire stock is subject to seizure and his business disrupted in the event that any petty police official considers a single publication unfit, will naturally hesitate to stock any publication which does not meet the approval of such petty official. The whim and taste of every minor official thus becomes the basis for the curtailment of expression with its resultant restriction of the communication of

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[13] Such a seizure, applied to a newspaper, would destroy the value of any news item of current significance.

ideas. The rationale of **Smith v. California,** 361 U. S. 147 supports this contention. Defendant was there convicted of violation of an ordinance which made it unlawful for a person to possess any obscene book in a bookstore. The California courts, upon a judicial investigation, found the book involved to be obscene and construed the ordinance as not requiring an element of scienter. California law thus did not require that the book dealer have knowledge of the contents of the book and the ordinance was construed as imposing a strict or absolute criminal liability. This Court held the ordinance to be unconstitutional on the ground that, by not so requiring knowledge on the part of the book seller, this operated as a self-censorship on the book seller and tended to restrict the sale of books to those he has inspected. In the instant case, the seller will tend to restrict the books he sells to those the police official has inspected or approved. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference". **Bates v. City of Little Rock,** 361 U. S. 516.

We do not know what test the police and sheriff applied in the first instance in seizing the publications. But we know that the application of the correct constitutional test of obscenity is a task of great magnitude. The determination of whether a book, as a whole, has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires," or "whether to the average person applying contemporary community standard, the dominant theme of the material taken as a whole appeals to prurient interests" is a perplexing and baffling problem. **Roth v. United States and Alberts v. California,** 354 U. S. 476, 486, 489. It "ought not to depend solely on the necessarily limited, hit-or-miss, subjective view" of the individual policeman or deputy sheriff. Sex and its portrayal are not synonomous with

obscenity. Only material dealing with sex in a manner appealing to prurient interests is obscene. 354 U. S. at 487. Furthermore, obscenity cannot be determined solely from the nature of the material but the question of customary freedom of expression has to be considered. A publication must be tested by contemporary community standards. And obscenity is not as "distinct, recognizable, and classifiable as poison ivy." "The separation of legitimate from illegitimate speech calls for more sensitive tools than [Missouri] has supplied." **Speiser v. Randall,** 357 U. S. 513, 525.

Indeed, Missouri permits what **Near v. State of Minnesota ex rel. Olson,** 283 U. S. 697 forbade. In **Near,** the defendant was enjoined from acting in the future because of past conduct. In Missouri, if a policeman concludes that a person has violated the obscenity laws, he may seize not only what he has concluded was the past violation but, in his future execution of a search warrant, may seize anything else he deems offensive.

Two authorities on obscenity have recognized that a serious threat to mass suppression of books lies in secret lists distributed by private or public officials threatening prosecution unless the books are removed from circulation. Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295, 395. Their view has been followed by the courts which have dealt with such issues. Threats of police and prosecuting officials to prosecute if a book is circulated have been enjoined because such actions effect a ban upon its sale by a non-judicial determination. **New American Library of World Literature v. Allen,** N. D. Ohio, 114 F. Supp. 823; **Bantam Books, Inc. v. Melko,** 25 N. J. Super. 292, 96 A. 2d 47; **HMH Pub. Co. v. Garrett, N. D. Ind.,** 151 F. Supp. 903; **Sunshine Book Co. v. McCaffrey,** 4 App. Div. 2d 643, 647 (N. Y.). And if the threat is illegal, the actual seizure

which makes the circulation impossible should likewise be illegal.

The Court below distinguished the New York and Missouri statutory schemes as a difference of degree based upon the time differentials. But the number of days between the institution of the proceeding in New York and the hearing without an intervening seizure is in no sense material in comparing the New York statute with the number of days provided in Missouri after seizure and the subsequent Court hearing. There is a curtailment in circulation in Missouri prior to any judicial determination outlawing the publication. The administrative censor, the policeman on the beat or the vice squad, is allowed to curtail circulation prior to approval. The number of days so intervening is meaningless because the unilateral seizure has already been accomplished and the absolute restraint imposed.

Such seizure was not allowed under the English common law which only authorized the seizure of stolen goods under a search warrant. **Entick v. Carrington,** 19 Howell's State Trials, Col. 1029; **Boyd v. United States,** 116 U. S. 616, 623. It was not until the passage of the Obscene Publications Act of 1857, 20 and 21 Vict. c. 83, that the seizure of obscene publications was allowed there under a search warrant.[14] The famous obscenity case of **Regina v. Hicklin** [1868], L. R. 3 Q. B. 360 involved such a procedure under that act. See Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 50-52.

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[14] The germ of the Missouri statute is to be found in Mo. Laws 1875, p. 100. It assumed its present form in Mo. Laws 1909, p. 440. Massachusetts enacted a seizure statute in 1835. Revised Statutes of the Commonwealth of Massachusetts, c. 130, § 11 (1836). See Grant and Angoff, Massachusetts and Censorship, III, 10 B. U. L. Rev. 147, 148 (1930). The postal laws forbidding the depositing of obscene publications in the mail authorized the issuance of a search warrant. Act of March 3, 1873, 17 Stat. 598, 599-600. A seizure provision is also contained in the tariff act. Act of August 30, 1842, 5 Stat. 548, 566-567.

The First Amendment was drafted with memories of England's licenses still fresh in the minds of the colonists. Accordingly, the major, though not exclusive purpose of the guarantee of free expression, is "to prevent previous restraints upon publications." **Near v. State of Minnesota, ex rel. Olson**, 283 U. S. 697, 713. The principle of immunity from prior restraint has been applied in a variety of situations to strike down licensing or censorship systems under which the right of speech, publication or assembly was conditioned upon obtaining the advance approval of an executive board or official vested with broad or undefined discretion. **Joseph Burstyn, Inc. v. Wilson**, 343 U. S. 495; **Staub v. City of Baxley**, 355 U. S. 313; **Superior Films, Inc. v. Dept. of Education of Ohio**, 346 U. S. 587; **Kunz v. People of State of New York**, 340 U. S. 290; **Niemotko v. State of Maryland**, 340 U. S. 268; **Thomas v. Collins**, 323 U. S. 516; **Lovell v. Griffin**, 303 U. S. 444. And censorship by the judiciary is just as impermissible as advance censorship by an administrative office. **Cantwell v. State of Connecticut**, 310 U. S. 296, 306.

Prior restraints hinder the development of sound standards for determining what is obscene. If prior restraints keep the public from knowing what books are being censored, public opinion, the very thing that should influence standards for determining obscenity, is prevented from doing so. Without prior restraint the public can know what publications are being banned as being obscene, and if so, demand more satisfactory methods for determining obscenity.[15] Public influence is also valuable in determining the outcome of individual cases. The public approval of the merits of a publication may influence the Court's decisions and prior restraint to remove this important public influence should be discouraged. See Emer-

[15] Even publications of no social worth are entitled to be shielded from unlawful or unconstitutional restraint. *Winters v. People of State of New York*, 333 U. S. 507.

son, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648.

At the very least until a publication has been adjudged to be obscene it cannot constitutionally be withheld from free circulation in the market place of ideas. Apart from the rights of the publisher and vendor the public itself has the right to read and examine whatever is published and to form its own opinion of the publication's value and propriety.

We should not overlook the institutional framework in which a trial judge operates under such a statute as the Missouri one. The function of the trial judge becomes that of a censor. He is given a whole variety of publications seized under a mass seizure. Since he, himself, issued the warrant and found probable cause he has interest in finding things to suppress. This forecloses or embarrasses further consideration of the case with its attendant danger of suppressing a legitimate utterance.

Just as a state may not affirmatively sanction police incursion into privacy,[16] a state may not affirmatively sanction a procedure which creates a substantial danger that legitimate utterances will be penalized or suppressed. In the former case, the remedy is to suppress the evidence. In the latter situation, the remedy should be to condemn the entire practice and to require the use of legitimate methods of combating obscenity.

While it has been said that the right of free expression is not absolute or unqualified under all circumstances it has also been stated that any invasion of that right must find justification in some overriding public interest and that restricting legislation must be narrowly drawn to meet an evil which the State has a substantial interest

[16] *Wolf v. Colorado*, 338 U. S. 25.

in correcting. **Joseph Burstyn, Inc., v. Wilson**, 343 U. S. 495, 502, 504. This Missouri has not done. And as we have shown, the method of procedure adopted is far from the narrow exception to freedom of expression allowed in the **Kingsley Book** case.

Missouri regulates alleged obscenity in the same manner as it controls gambling, intoxicating liquor and diseased cattle. The Missouri Supreme Court's view of obscenity was that "its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of the community. The courts have never hesitated to enjoin potential menaces to public health or to approve the vaccination or inoculation of school children and others when reasonably required. Obviously, a state government does not have to permit the homes of its citizens to be destroyed by fire when the arson can be reasonably prevented" (R. 120).

But, it is unreasonable to attempt to place statutes dealing with alleged obscene publications on the same footing as statutes directed generally against gambling, intoxicating liquor or disease, **Smith v. California**, 361 U. S. 147. The specific constitutional guarantees of freedom of speech and of the press stand in the way of allowing publications to be seized in like manner. There is no similar specific constitutional inhibition applicable to gambling equipment, intoxicating liquor or disease; yet it was the conclusion of the Court below that books, pamphlets, magazines, and all writings can be regulated by a state in like manner.

The evil which the Missouri statutes seek to avoid is the prevention of the dissemination of obscenity in order to protect the public from character contamination (R. 120). But the relative seriousness of this supposed evil and the degree of probability that this evil will result are outweighed by the dangers to free expression under its statu-

tory scheme. It certainly does not justify the short-cut procedure which was utilized in this case. **Speiser v. Randall**, 357 U. S. 513, 529.

III.

The courts below applied unconstitutional tests of obscenity.

The opinion of the trial judge shows that he applied unconstitutional tests of obscenity (R. 81-91). He relied principally on the opinion of the Missouri Supreme Court in **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283 (Appendix B, infra, p. 41). His quotes from the earlier Missouri cases of **State v. Mac Sales Co.**, Mo. App., 265 S. W. 2d 860 and **State v. Pfenninger**, 76 Mo. App. 313 are the same quotes found in the **Becker** case. It is clear that he applied the test of whether the publication might incite lascivious thoughts or arouse lustful desires "of those whose minds are open to such influences and into whose hands such a publication may fall" and whether the publication "would arouse lewd or lascivious thoughts in the susceptible" (R. 83-84). Such a test would make it impossible to make available for the general public a book found to have a potentially deleterious influence on children. **Butler v. Michigan**, 352 U. S. 380; **Volanski v. United States**, 6 Cir., 246 F. 2d 842; **Goldstein v. Commonwealth of Virginia**, 104 S. E. 2d 66. Nor did the trial judge make any finding that the publications condemned had a substantial tendency to corrupt or deprave the average person. **Roth v. United States**, 354 U. S. 476, 487. Indeed he even ignored the dominant theme of the material and made no finding that the predominant appeal of the publications considered as a whole was to prurient interests. On the contrary the explicit view of the trial Court was that the book would tend to deprave those who were susceptible. The trial Court also did not apply contemporary communi-

ity standards as a test for obscenity and excluded from consideration whether each publication "goes substantially beyond customary limits of candor, description or representation." 354 U. S. at 487, fn. 20.

It is also clear that the reasonable interpretation of the **Becker** case is that it adopted the test originally stated in **Regina v. Hicklin** [1868], L. R. 3 Q. B. 360: ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Let us examine **Becker**. The Court first applied such a test to determine whether the nudist publications before it were obscene. Its use of this standard is further apparent when it determines that the testimony of the expert witness offered by the defense was properly excluded, stating: "No college professor or other expert was required to determine whether these publications are obscene and offensive to good morals, or might arouse lustful desires, or encourage commission of crime by the susceptible man or woman, boy or girl.". 272 S. W. 2d at 287. Finally, in determining the meaning of the words "indecent, immoral or scandalous" in the statute, the court concluded that indecent means "that which would arouse lewd or lascivious thoughts in the susceptible" and that these words are synonymous with obscene. 272 S. W. 2d at 287-288. We are not alone in our interpretation of the test adopted by **Becker**. Two noted authorities on obscenity have described that case as applying the "antedeluvian point of view". Lockhart and McClure, Obscenity in the Courts, 20 Law & Contemp. Prob. 587, 606 (1955).

On appeal, the appellate court found that its decision in **State v. Becker**, was approved by this Court in the **Roth** case because the **Becker** case was listed in a footnote as one of the decisions which has rejected the Hicklin test

and substituted the proper standard. The court below never met the issue as to whether the publications were obscene under the constitutional tests. On the one hand, it held that it was not bound by the trial Court's opinion (R. 122), and, on the other hand, it concluded that the judgment of the lower Court was not "clearly erroneous" (R. 127). As a result, the Missouri Supreme Court did not squarely meet the issue as to whether the test applied to the publications was a proper one in view of **Roth v. United States** and **Alberts v. California**, 354 U. S. 476. The result of the trial and the appellate courts' opinions is that the correct test of obscenity is never applied to the publications in this case. To hold that the appellate court is not bound by such findings and conclusions, and that the trial judge's decision is not clearly erroneous, does not constitute a review of the alleged obscenity of the material in question by a proper standard, as set out in **Roth v. United States**, 354 U. S. 476, and thereby impairs appellants' freedom of speech.

The procedure adopted in this case was designed to avoid the requirement of a jury. The statutes here involved provide for the determination of that issue after seizure by the judge who issues the warrant. Under such circumstances, it is questionable whether an appellate Court may constitutionally apply the "clearly erroneous" test in reviewing a finding that a publication is obscene based upon documentary evidence. Before a finding is reversed in a case employing such a test, the record must leave the court with a definite and firm conviction that a mistake has been made.[17] Yet the possibility of mistaken fact-finding creates the danger that the legitimate utterance will be penalized. **Speiser v. Randall**, 357 U. S. 513, 526. Liberty of the press is more secure if full appellate review

[17] *United States v. Oregon State Medical Soc.*, 343 U. S. 326, 339.

is allowed. 1 Chaffee, Government and Mass Communications, pp. 221-225.

But we do not have to reach that issue in this case. Rather we have a mass seizure by a police official, a hearing before a trial judge who followed an opinion that adopted an unconstitutional standard and a review by an appellate court which applied a "clearly erroneous" test to a case which was never properly decided. The result is the condemnation of these publications in violation of the constitution.

CONCLUSION.

It is submitted that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions and Missouri Statutes and Court Rule Involved.

The First Amendment of the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *

The Fourteenth Amendment of the Constitution provides in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

Chapter 542 of the Missouri Revised Statutes 1949 contains the following statutes:

> **542.380. Warrant may be issued for seizure of certain propery, when.**—Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:
>
> (1) Any gaming table, or other gaming device or apparatus used in gambling, or any books, instruments, boards, devices or paraphernalia used in reporting, recording, communicating or registering bets or wagers, or selling pools, or property owned by any person

furnishing public communication services to the general public subject to the regulations of the public service commission after such person has failed to remove the property within a reasonable time after receipt of written notice from an official charged with enforcement of the law stating that such property is being used as an instrumentality to violate the law, or any other gambling device prohibited by law;

(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained;

(3) Any of the following articles, kept for the purpose of being sold, given away or otherwise distributed or circulated, contrary to law, viz.: pills, powders, medicines, drugs or nostrums, or instruments or other articles or devices for preventing conception, producing or procuring abortion or miscarriage, or other indecent or immoral use, or any letters, handbills, cards, circulars, books, pamphlets, advertisements or notices of any kind describing or purporting to describe any of such articles, or giving information, directly or indirectly, when, where, how, or of whom any of such things can be obtained;

(4) All articles or raw materials found in the possession of any person or persons intending to manufacture the same into any articles or things heretofore in this section described, and also all tools, ma-

chinery, implements and personal property where such articles are found and seized and used or intended to be used in the manufacture of such articles and things.

Section 542.390. Warrant shall describe place and articles to be seized or searched for—power of officer.—Such search warrants shall describe the place to be searched or the things to be seized, as nearly as may be, and shall direct the officer serving the same to seize such articles and bring them before the judge or magistrate issuing the warrant. The officer who shall be charged with the execution of any warrant specified in sections 542.380 and 542.390 shall have power, if necessary, to break open doors for the purpose of executing the said warrant, and for that purpose may summon to his aid the power of the county.

Section 542.400. Defendant to have notice of date of hearing.—The judge or magistrate issuing the warrant shall set a day, not less than five days nor more than twenty days after the date of such service and seizure, for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing. Written notice of the date and place of such hearing shall be given, at least five days before such date, by posting a copy of such notice in a conspicuous place upon the premises in which such property is seized and by delivering a copy of such notice to any person claiming an interest in such property, whose name may be known to the person making the complaint or to the officer issuing or serving such warrant, or leaving the same at the usual place of abode of such person with any member of his family or household above the age of fifteen years. Such notice shall be signed by the magistrate or judge or by the clerk of the court of such judge.

Section 542.410. Rights of property owner.—The owner or owners of such property may appear at such hearing and defend against the charges as to the nature and use of the property so seized, and such judge or magistrate shall determine, from the evidence produced at such hearing, whether the property is the kind of property mentioned in section 542.380.

Section 542.420. Disposition of property.—If the judge or magistrate hearing such cause shall determine that the property or articles are of the kind mentioned in section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appears that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence.

* * * * * * *

Rule 33 of the Rules of Criminal Procedure of the Missouri Supreme Court provides in pertinent part:

33.01—Searches and Seizures—Complaint—Search Warrant—Description of Property and Place. (a) If a complaint in writing be filed with the judge or magistrate of any court having original jurisdiction to try criminal offenses stating that personal property (1) which has been stolen or embezzled, or (2) the seizure of which under search warrant is now or may hereafter be authorized by any statute of this State, is being held or kept at any place or in any building, boat, vessel, car, train, wagon, aircraft, motor vehicle or other vehicle or upon any person within the terri-

torial jurisdiction of such judge or magistrate, and if such complaint be verified by the oath or affirmation of the complainant and states such facts positively and not upon information or belief; or if the same be supported by written affidavits verified by oath or affirmation stating evidential facts from which such judge or magistrate determines the existence of probable cause, then such judge or magistrate shall issue a search warrant directed to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described.

(b) The complainant and the warrant issued thereon must contain a description of the personal property to be searched for and seized and a description of the place to be searched, in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same.

* * * * * * *

33.03—Searches and Seizures—Motion to Suppress—Return of Property. (a) A person aggrieved by an unlawful search and seizure made by a peace officer and against whom there is pending any criminal proceeding growing out of the subject matter of said search and seizure, may file in the court in which such proceeding is pending, a motion to suppress the use in evidence of the articles taken by means of such seizure and any evidence gained by the peace officers by means of such search. Such motion may be based upon any one or more of the following grounds:

1. That the search and seizure were made without warrant and without other lawful authority;

2. That the warrant was improper upon its face or was illegally issued (including the issuance of warrant without a proper showing of probable cause);

3. That the property seized was not that described in the warrant and that the officer was not otherwise lawfully privileged to seize the same;

4. That the warrant was illegally executed by the officer;

5. That in any other manner the search and seizure violated the rights of the movant under Section 15 of Article 1 of the Constitution of Missouri or Amendment 14 of the Constitution of the United States. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The motion to suppress evidence shall be filed before the commencement of the trial or hearing unless opportunity therefor did not exist or unless the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain such a motion during the trial or hearing.

(b) If the property alleged to have been unlawfully seized is not of such a nature that its possession would constitute a criminal offense under the laws of this State, then such motion may pray for and the court, if the motion be sustained, may order the return of such property to the person from whom it was taken. In such case the motion may be filed with the court in which a criminal proceeding against the person from whom such property was taken is pending or if there be no such proceeding pending, the motion may be filed with the judge or magistrate issuing the warrant under which the search was made."

* * * * * * *

APPENDIX B.

State v. Becker, 364 Mo. 1079, 272 S. W. 2d 283, affirmed a conviction for the possession with intent to sell and circulate certain nudist publications in violation of the Missouri criminal obscenity statute, § 563.280, R. S. Mo. 1949. The parts of the opinion which bear upon the standard of obscenity adopted by the Supreme Court of Missouri follow:

* * * * * * *

Defendant's brief asserts that the first issue to be decided in this case is whether the instant publications are "obscene, lewd, licentious, indecent or lascivious or of an indecent, immoral or scandalous character." A determination of that question will rule defendant's first contention and assignment of error.

In the case of State v. Mac Sales Co., Mo. App., 263 S. W. 2d 860, loc. cit. 863, the St. Louis Court of Appeals stated: "With reference to (4), supra, one test of obscenity is whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such a publication may fall. 33 Am. Jur., Lewdness, Indecency and Obscenity, § 4, p. 17; 67 C. J. S., Obscenity, § 7c, p. 30 et seq. We have defined obscenity as 'such indecency as is calculated to promote the violation of the law and the general corruption of morals * * * and include what is foul and indecent, as well as immodest, or calculated to excite impure desires.' State v. Pfenninger, 76 Mo. App. 313."

The test of obscenity is set forth in 67 C. J. S., Obscenity, § 7, p. 30, as follows: "The test which determines the obscenity or indecency of a publication is the tendency of the matter to deprave and corrupt the morals by inciting the lascivious thoughts or arousing

the lustful desire of those whose minds are open to such influences, and into whose hands such a publication may fall. * * *"

A test frequently relied upon by courts in this country is that stated by Cockburn, Ch. J., in the case of Reg. v. Hicklin [1868], L. R. 3 Q. B. 360, 371, 8 Eng. Rul. Cas. 60: "I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

In United States v. Harmon, D. C., 45 F. 414, loc. cit. 417, the court, in discussing the statute prohibiting the use of the mails for obscene matter, stated: "Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, What is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls, * * *."

See also, King v. Commonwealth, 313 Ky. 741, 233 S. W. 2d 522; Commonwealth v. Donaducy, 167 Pa. Super. 611, 76 A. 2d 440, 442; Commonwealth v. New, 142 Pa. Super. 358, 16 A. 2d 437; State v. Weitershausen, 11 N. J. Super. 487, 78 A. 2d 595; People v. Eagle, 203 Misc. 598, 117 N. Y. S. 2d 380; People v. Ring, 267 Mich. 657, 255 N. W. 373, 375, 93 A. L. R. 993, and cases collected in 29 Words and Phrases, Obscene, page 68 et seq.

It is our duty and responsibility to determine whether these publications are obscene, lewd, lascivious, licentious, and of a scandalous, indecent or immoral character. It seems clear to us that they are. Even judges may know what falls within the classification of the decent, the chaste and the pure in either social life or in publications, and what must be deemed obscene and lewd and immoral and scandalous and lascivious. These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts. The people of this State speaking with their constitutional voice, the General Assembly, enacted this statutory proscription of obscenity for the protection of **all** the people of the State. Under this statute and the prior rulings of the courts we may not disregard an unambiguous enactment which has as its obvious purpose the protection of the morals of the susceptible into whose hands these publications may come. While we recognize that morality may not be attained by legislation, a people nonetheless need and deserve a moral standard and the protection and enforcement of such a statute. After applying the required tests all the members of this Court have concluded that the contents of these publications tend to incite lascivious thoughts, arouse lustful desire, encourage breaches of the law, and promote and encourage commission of crime, law and violation and moral decay. Defendant's first contention is therefore denied.

In support of his first contention defendant relies upon and cites to us such cases as Parmelee v. United States, 72 App. D. C. 203, 113 F. 2d 729; United States v. One Book Entitled Ulysses, 2 Cir., 72 F. 2d 705; State v. Lerner, Ohio Com. Pl., 81 N. E. 2d 282, and People v. Burke, 243 App. Div. 83, 276 N. Y. S. 402. We have examined all the cases cited by defendant but must decline to follow them. The apparent ra-

tionale of those and other cases which reach a conclusion contrary to that we have above expressed seems to us to be confounded of confusion and artificialities, and seems not to have considered certain basic concepts and teachings which we deem important. Some opinion writers have variously defined obscenity as a "Function of many variables" and also as, "The present critical point in the compromise between candor and shame at which the community may have arrived here and now." Another writer has stated that the word "obscene" is not susceptible of exact definitions because "Such intangible moral concepts as it purports to connote vary in meaning from one time to another." It is difficult to follow the reasoning of some of the cases cited by defendant.

In any event, we live today in a clothed civilization. The people of Missouri exercised the State's sovereign police power in enacting this statute, and we may not by judicial fiat invade the legislative function and rule that the people of Missouri did not mean what this unambiguous statute so exactly and solemnly declares, and in so ruling be untrue to our responsibility and to the public trust reposed in us.

Defendant next contends that the court erred in excluding the offered testimony of a certain college professor, who held certain degrees in psychology and philosophy, that the instant publications were not obscene, lewd, licentious, lascivious, indecent, and of an indecent, immoral and scandalous character. Defendant asserts that the professor witness was qualified as an expert in this field and asserts also that the testimony rejected was within the proper scope of expert testimony in this case. We rule that the trial court did not err in excluding the offered testimony.

We need not here consider or discuss the claimed qualifications of the witness for we must rule that the subject matter of the excluded testimony was not

within the proper scope of any expert testimony in this case. Under the instant facts the learned trial court had the responsibility under the law of ruling whether the publications came within the prohibitions of the statute, and he knew far better than any lay professor when, under the statute controlling judicial decisions, the publications were in fact and in law obscene and immoral. Section 563.280 does not define the words "obscene, lewd, licentious, indecent or lascivious * * * immoral or scandalous" but those words are themselves descriptive. They are words of common usage and most every person (and certainly the trial judge) understands their meaning. The trial judge was capable of applying their legal and lay meaning to these publications. No college professor or other expert was required to determine whether these publications are obscene and offensive to good morals, or might arouse lustful desires, or encourage commission of crime by the susceptible man or woman, boy or girl. The issue being tried was whether the instant publications were obscene and immoral and while defendant was entitled to prove any fact legitimately bearing upon such issue, defendant could not substitute the claimed expert witness's opinion thereon for the ultimate fact which the trial court was compelled to find and rule. This contention must be denied. McAnany v. Henrici, 238 Mo. 103, 141 S. W. 633; People v. Muller, 96 N. Y. 408.

We come now to defendant's contention that the statute in question here is too vague and indefinite, and fails to set up an ascertainable standard of guilt, and that it therefore contravenes both the State and Federal due process provisions. Missouri Constitution, Article I, Section 10, and the Fourteenth Amendment of the Federal Constitution. The exact contention, simply stated, is that the statute is so void of

meaning that no person, even one who desired to obey the statute, could fairly be sure whether he was doing that which the statute prohibited.

The instant Information charges that defendant possessed, with intent to sell and circulate, "certain obscene, indecent, scandalous and immoral publications, to wit, 648 Publications entitled 'Solaire Universalle De Nudisme' and 195 entitled 'Sunshine and Health.'" etc. Defendant now specifically contends that the statute is so vague and indefinite as to provide no ascertainable standard of guilt because the statute includes therein the words, "indecent, immoral or scandalous." Defendant does not contend that the statute is vague or indefinite because it uses the words "obscene, lewd, licentious or lascivious."

It may be conceded that a crime must be defined with sufficient definiteness that there be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. Ex parte Hunn, 357 Mo. 256, 207 S. W. 2d 468; Winters v. People of State of New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

The words "indecent, immoral or scandalous" as used in this statute, and particularly as used therein in connection with the words "obscene, lewd, licentious and lascivious," are not words of hidden or obscure or uncertain meaning. Those words are not technical terms of the law. The word "indecent" is a common word of common understanding. It has been defined to mean unfit to be seen or heard; immodest; gross; obscene; offending against modesty and less than immodest; that which would arouse lewd or lascivious thoughts in the susceptible. People v. Eastman, 188 N. Y. 478, 81 N. E. 459, 460; Wood v. State ex rel. Boykin, 45 Ga. App. 783, 165 S. E. 908, 911; Duncan v. United States, 9 Cir., 48 F. 2d 128, 132; Webster's

New International Dictionary; United States v. Chesman, C. C., 19 F. 497; United States v. Clarke, D. C., 38 F. 500. The word "immoral" is likewise a word of common understanding. It means hostile to the welfare of the general public; morally evil, impure, vicious or dissolute; licentious misconduct. Jones v. Poole, 62 Ga. App. 309, 8 S. E. 2d 532; Warkentin v. Kleinwachter, 166 Okl. 218, 27 P. 2d 160; People ex rel. First Nat. Pictures v. Dever, 42 Ill. App. 1; United States v. One Book Entitled "Contraception," D. C., 51 F. 2d 525. The word "scandalous" as used in the statute in connection with the words "obscene, lewd, licentious, lasciyious, immoral" means shocking to decency or propriety, offensive, disreputable. Webster gives as synonyms of "scandalous," the words detestable, base, vile, shameful. Polson v. Polson, 140 Ind. 310, 39 N. E. 498, 499; In re Riverbank Canning Co., 95 F. 2d 327, 25 C. C. P. A., Patents, 1028.

The words of the statute "obscene, lewd, licentious, indecent, lascivious, immoral, scandalous" are used therein as descriptive of the character of the publication prohibited to be possessed with intent to sell or circulate, are all synonymous and of similar meaning. Those descriptive words are neither vague nor indefinite. They are words of common usage and understanding, and as used in this statute, and in law, they have a meaning understood by all. Those words set out within this statute a clear and ascertainable standard of guilt which is readily to be comprehended. The statute as a whole, when read and considered in its entire text and subject matter, is so clear and unequivocal and so understandable and certain that no person of common intelligence would be compelled to guess at its meaning and purpose. The standard of guilt is obvious from a reading of the statute. In any event, statutes of this character, enacted for the clear

purpose of eliminating certain evils and certain crimes against the person which publications of this character unquestionably tend to promote, are allowed a degree of permissible uncertainty in the use of such words as obscene, lewd, lascivious, indecent, immoral and scandalous. Winters v. People of State of New York, supra. Such allowance of uncertainty stems from the fact that the above words are well understood by everyone through long and continued use in the criminal law.

But we rule that the statute clearly limits punishment to possession with intent to sell or circulate publications which are obscene, indecent, immoral, scandalous, lewd, licentious or lascivious, as those words were formerly used and have always been understood.

In Fox v. State of Washington, 236 U. S. 273, 35 S. Ct. 383, 384, 59 L. Ed. 573, the United States Supreme Court considered a statute of the State of Washington directed against printed matter tending to encourage and advocate disrespect for law. It was there contended that the statute was too vague for a criminal law in that it contained no ascertainable standards of guilt. Mr. Justice Holmes, writing the unanimous opinion of the Court, inter alia, said: "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See Nash v. United States, 229 U. S. 373, 33 S. Ct. 780, 57 L. Ed. 1232; International Harvester Co. [of America] v. [Commonwealth of] Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284."

Defendant's contention that the statute in question here is too vague and indefinite and fails to set up an ascertainable standard of guilt must be denied.

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